

ORIGINAL

JOSEPH E. DUNNE III
ATTORNEY AT LAW
SUITE 520
1000 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, DC 20007

TELEPHONE
(202) 298-6345

January 31, 1995

TELECOPIER
(202) 298-6375

William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
HARD DELIVER

JAN 31 1995

FEDERAL COMMUNICATIONS COMMISSION
DOCKET FILE COPY ORIGINAL

ATTN: The Honorable John Frysiak

RE: Family Broadcasting, Inc., Hague, New York, MM Docket No.
94-20

Dear Mr. Caton:

Transmitted herewith on behalf of Family Broadcasting, Inc. is an original and six copies of its "Proposed Findings of Fact and Conclusions of Law" filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

FAMILY BROADCASTING, INC.

By: Joseph E. Dunne III
Joseph E. Dunne III
Its Attorney

JED:B91
enclosure

xc: All Per Attached Certificate of Service
Alex D. McEwing

No. of Copies rec'd
LIN ABCDE

046

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED
JAN 31 1995
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of)	MM Docket No. 94-20
)	
FAMILY BROADCASTING, INC.)	File No. BPH-910924MB
)	
)	
For Construction Permit)	
for a New FM Station on Channel)	
229A, Hague, New York)	

DOCKET FILE COPY ORIGINAL

To: The Honorable John M. Frysiak
Administrative Law Judge

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prepared by:

Joseph E. Dunne III, Esq.
Attorney at Law
Suite 520
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 298-6345

January 31, 1995

TABLE OF CONTENTS

	<u>Page No.</u>
SUMMARY	iii
I. PRELIMINARY STATEMENT	1
II. FINDINGS OF FACT	3
III. CONCLUSIONS OF LAW	17
A. The Weight of the Evidence Establishes That McEwing Had Permission To Specify the Mt. Defiance Site In Family's Application	18
B. There is No Credible Evidence That Family Intentionally Misrepresented the Availability of the Mt. Defiance Site	27
C. Family's Amendment Should Be Accepted	30
1. Family Had Reasonable Assurance of the Availability of Its Site and the Amendment Otherwise Meets the Erwin O'Connor Test	30
2. Under the Particular Facts of This Case, Family's Amendment Should Be Accepted Regardless of Whether It Had Reasonable Assurance of Its Originally Specified Site	33
IV. ULTIMATE CONCLUSION	38

TABLE OF CITATIONS

I. <u>Cases Cited</u>	Page No.
<u>62 Broadcasting, Inc.</u> , 4 FCC Rcd 1768, 65 Rad. Reg. 2d (P&F) 1829 (Rev. Bd. 1989), <u>review denied</u> , FCC 90-48 (released February 13, 1990)	30, 34
<u>Brownfield Broadcasting Corp.</u> , 93 F.C.C.2d 1197, 53 Rad. Reg. 2d (P&F) 1175 (Rev. Bd. 1983), <u>review denied</u> 84-11 (released January 17, 1984)	36
<u>California Broadcasting Corp.</u> , 90 F.C.C.2d 800, 51 Rad. Reg. 2d (P&F) 1539 (1982)	31
<u>Cannon Communications Corp.</u> , 5 FCC Rcd 2695, 67 Rad. Reg. 2d (P&F) 1159 (Rev. Bd. 1990)	34
<u>Classic Vision, Inc.</u> , 104 F.C.C.2d 1271, 60 Rad. Reg. 2d (P&F) 1681 (Rev. Bd. 1986), <u>review denied</u> 2 FCC Rcd 2375 (1987)	30, 35
<u>Erwin O'Connor</u> , 22 F.C.C.2d 140, 18 Rad. Reg. 2d (P&F) 820 (Rev. Bd. 1970)	31-33
<u>Family Broadcasting, Inc.</u> , 93 F.C.C.2d 771, 53 Rad. Reg. 2d (P&F) 662 (Rev. Bd. 1983), <u>review denied</u> FCC 83-559 (released November 29, 1983)	36
<u>Fox Broadcasting, Inc.</u> , 93 F.C.C.2d 127, 53 Rad. Reg. 2d (P&F) 44 (1983)	28
<u>Gross Broadcasting Co.</u> , 46 Rad. Reg. 2d (P&F) 1091 (1979)	32
<u>Harrison Broadcasting Co.</u> , 6 FCC Rcd 5819, 70 Rad. Reg. 2d (P&F) 40 (Rev. Bd. 1991), <u>review denied</u> , FCC 92-204 (released May 12, 1992)	35, 36
<u>Imagists, Inc.</u> , 8 FCC Rcd 2763, 72 Rad. Reg. 2d (P&F) 632 (1993)	32, 38
<u>Kaldor Communications, Inc.</u> , 96 F.C.C.2d 995, 55 Rad. Reg. 2d (P&F) 567 (Rev. Bd. 1984)	18
<u>Kaye-Smith Enterprises</u> , 71 F.C.C.2d 1402, 1415, 45 Rad. Reg. 2d (P&F) 983 (1979)	29
<u>Las Americas Communications, Inc.</u> , 5 FCC Rcd 1634, 67 Rad. Reg. 2d (P&F) 801 (1990)	33
<u>Madelene Gunden Partnership</u> , 2 FCC Rcd 5513, 63 Rad. Reg. 2d (P&F) 1647 (Rev. Bd. 1987), <u>review denied</u> , 3 FCC Rcd 7186 (1988)	34
<u>MCI Communications Corp.</u> , 3 FCC Rcd 509, 512, 64 Rad. Reg. 2d (P&F) 672 (1988)	28

<u>National Innovative Programming Network, Inc. of the East Coast</u> , 2 FCC Rcd 5641, 63 Rad. Reg. 2d (P&F) 1534 (1987)	18, 30
<u>Port Huron Family Radio, Inc.</u> , 4 FCC Rcd 2532, 66 Rad. Reg. 2d (P&F) 545 (Rev. Bd. 1989), <u>review granted, modified on another point</u> , 5 FCC Rcd 4562 (1990)	30, 34
<u>Progressive Radio, Inc.</u> , 103 F.C.C.2d 429, 59 Rad. Reg. 2d (P&F) 1173 (Rev. Bd. 1986)	35
<u>South Florida Broadcasting Co.</u> , 99 F.C.C.2d 840, 57 Rad. Reg. 2d (P&F) 495 (Rev. Bd. 1984)	30, 34
<u>Tuscon Community Broadcasting, Inc.</u> , 4 FCC Rcd 6316, 66 Rad. Reg. 2d (P&F) 1689 (1989)	36

II. Statutes Cited

47 C.F.R. § 73.3522(b)	32
47 C.F.R. § 1.263 (1994)	1

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)	MM Docket No. 94-20
)	
FAMILY BROADCASTING, INC.)	File No. BPH-910924MB
)	
)	
For Construction Permit)	
for a New FM Station on Channel)	
229A, Hague, New York)	

To: The Honorable John M. Frysiak
Administrative Law Judge

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY STATEMENT

1. Family Broadcasting, Inc. ("Family"), by its undersigned attorney and pursuant to Section 1.263 of the Commission's Rules and Regulations, 47 C.F.R. § 1.263 (1994), hereby submits its "Proposed Findings of Fact and Conclusions of Law" in the above-captioned matter.

2. This proceeding involves Family's application for a new FM station on channel 229A in Hague, New York ("the Application") which was filed on September 24, 1991. By Hearing Designation Order, DA 94-215 (released March 23, 1994) ("HDO") Family's application was designated for hearing on the following issues:

1. To determine, with respect to Family Broadcasting, Inc.:

a) whether the applicant, at the time it so certified, had reasonable assurance that its proposed site would be available to it;

b) whether, in light of the evidence adduced pursuant to the foregoing issue, the

applicant misrepresented to the Commission the availability of its specified site; and

c) if (b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

The HDO also rejected that portion of an amendment filed on January 27, 1992 which specified a new antenna site for the Family's application because the applicant had not provided a showing of good cause required by Section 73.3522(a)(6).

3. A prehearing conference was held in this proceeding on May 24, 1994 (Tr. 1-5), and a hearing was held in Washington, D.C. on November 2, 1994 (Tr. 6-86). On November 1, 1994 Family filed a Petition for Leave to Amend and an amendment specifying the same site as it had in its January 27, 1992 amendment. The Presiding Officer directed the parties to address the merits of Family's Petition for Leave to Amend in their respective Findings and Conclusions (Tr. 12-13). The record in this proceeding was closed by the Presiding Officer's Order, FCC 94M-612 (released November 9, 1994).

4. For the reasons more fully set forth below, issue 1 specified in the HDO should be resolved in Family's favor, its pending Petition for Leave to Amend granted and the amendment accepted, and Family's application for channel 229A, Hague, New York, be granted.

II. FINDINGS OF FACT^{1/}

5. Family Broadcasting, Inc. is the licensee of WGLY-FM, Waterbury, Vermont; WGLV-FM, Hartford, Vermont; and, low power television station W39AS, Burlington, Vermont. Ex. 1, p. 1. Family is also the permittee of WMNV-FM, Rupert, Vermont. Alex D. McEwing is the president and 39.8 percent shareholder of Family, and is also the president and a director of Christian Ministries, Inc., a nonprofit nonstock organization which is the permittee of a noncommercial FM station in Bolton, Vermont (BPED-931103MA)^{2/} and which has applied for a noncommercial FM station in Barre, Vermont (BPED-930311MA). Mr. McEwing has been the largest stockholder and the president of Family since February 12, 1986.

6. When Mr. McEwing began looking for a site for the Hague application he realized that the Mt. Defiance site was the best site for the application and called an acquaintance whom he had known for a number of years (Tr. 36), Dave Gallety, to find out if he knew who controlled the site. Ex. 1, Att. A, p. 1. Mr. Gallety gave McEwing the name and telephone number of Nick Westbrook (Ex. 1, Att. A, p. 1), which Mr. McEwing noted in his

^{1/} References in the transcript will be noted in the text as "Tr. ____." Since only Family submitted exhibits, references to exhibits will be noted as "Ex. ____, p. ____." References to attachments to exhibits will be cited as "Ex. __, Att. __, p. ____." To avoid a number of redundant citations, the source for each sentence is the last cited source.

^{2/} Since the closing of the record in this proceeding Christian Ministries, Inc.'s application for Bolton has been granted.

notes of the conversation as "Nick Westburg." Ex. 1, Att. A, p. 5. Gallety was familiar with the site, gave McEwing technical information concerning the site, and confirmed that space was available on the tower. Ex. 1, Att. A, p. 1; Tr. 38.

Immediately following his conversation with Gallety, McEwing called Mr. Westbrook (Ex. 1, Att. A, p. 1) and had a telephone conversation of 10 minutes duration with him. Ex. 1, Att. A, p. 7. Mr. McEwing took contemporaneous notes of his conversations with Mr. Gallety and Mr. Westbrook. Ex. 1, Att. A, p. 5; Tr. 39.

7. McEwing introduced himself to Mr. Westbrook as a representative of Family (Ex. 1, Att. A, p. 2), and said that Dave Gallety had given him Mr. Westbrook's name. Tr. 40. McEwing also told Westbrook that he was under some pressure to get an application for Hague on file because the allocation was vacant and the application was being filed on a "first come-first served" basis. Ex. 1, Att. A, p. 2 McEwing told Westbrook that he wanted to check to see if the Mt. Defiance site was available for an FM application for Hague, New York. Westbrook responded that he needed a "formal proposal," including the applicant's tax status, which Mr. McEwing discussed with him. Ex. 1, Att. A, p. 2; Tr. 42. In addition, Westbrook noted that the proposal should include a reference to the amount of rent that Family proposed paying, the time frame during which the station would be built, how much room Family would require in the building, and approximately how much electricity the station would use.

McEwing's notes of the conversation include a notation concerning "tenant 1 percent of gross" (Ex. 1, Att. A, p. 5), which referred to a comment made by Mr. Westbrook concerning the rent paid by one of the other users of the site. Ex. 1, Att. A, p. 4; Tr. 51. The notes also include the notation, "Okay," Ex. 1, Att. A, p. 5, which refers to McEwing's reaction to Mr. Westbrook's request for a written proposal. Tr. 43. Mr. McEwing told Westbrook that he would "make it worth his while." Tr. 52.

8. Mr. McEwing then explained that the FCC process took a long time, and that Family would not likely need to use the site for many months, but that Family was under time constraints to file its application quickly. Ex. 1, Att. A, pp. 4-5. McEwing explained that the FCC required that an applicant have "reasonable assurance" of the availability of its antenna site, which meant that the site was available and that he (Westbrook) would rent the site to Family. McEwing told Westbrook that they did not need to agree on a specific monthly rental, that the specific details could be negotiated later if he were willing to rent the site to Family. McEwing knew what "reasonable assurance" meant because he had spoken to his communications counsel, Mr. Dunne, concerning the matter (Ex. 1, p. 2), prior to his conversation with Mr. Westbrook. Tr. 33. McEwing understood that Family didn't need to have negotiated the terms and conditions of a lease to have reasonable assurance of a site, but that Family, at least, had to have the permission of the site owner to specify the site in an application. In Mr. McEwing's

mind "reasonable assurance" meant "one that the site was available and secondly that the site was available to rent for me." Tr. 33, 34. McEwing's understanding of what "reasonable assurance" meant was confirmed in writing by counsel. Ex. 1, Att. B, p. 2.

9. Because he was in a hurry to get the application on file, McEwing asked Westbrook if he (Westbrook) had any objections to Family filing an application on the Mt. Defiance site. Ex. 1, Att. A, p. 3; Tr. 41, 44, 47, 53. Mr. Westbrook replied that he had a board meeting coming up soon, and that he would like Family to "send him a letter." Ex. 1, Att. A, p. 2; Tr. 44, 46. McEwing agreed to send the requested letter. Ex. 1, Att. A, p. 2. McEwing, when the conversation with Mr. Westbrook ended, believed that Westbrook would not object to Family specifying the Mt. Defiance site in its application and that he had to prepare a formal written proposal for Westbrook to commence the negotiating process. Specifically, Mr. McEwing believed:

There was a site available, that it was available to me, that he was entertaining a letter and did not indicate any objections to my specific question, if he had any objections, to me, specifying the site, Mt. Defiance, in my application. Tr. 47.

McEwing also testified that Mr. Westbrook did not tell him that he (Westbrook) would accept written proposals only. Tr. 55.

10. After his conversation with Nicholas Westbrook on September 18, 1991, McEwing immediately called Gary Savoie, a consulting engineer, and asked him to prepare the application for

channel 229A in Hague. Ex. 1, p. 2. McEwing's telephone records show that the call took place immediately after the conversation with Mr. Westbrook, and that the conversation took over 32 minutes. Ex. 1, Att. A, p. 7; Ex. 3, p. 1.

11. McEwing's and Savoie's accounts of the conversation agree in all pertinent points. McEwing told Savoie that there was some urgency in the matter because the window for filing for the allocation has closed and the application would be a "first-come, first-served" application. Ex. 1, p. 2; Ex. 3, p. 1. McEwing instructed Savoie to specify the Mt. Defiance site of WANC-FM, and gave him some technical information about the site. Both McEwing and Savoie recalled that Savoie specifically asked McEwing if Family had gotten permission to use the site. Ex. 1, p. 2; Ex. 3, p. 1. Savoie asked McEwing something like: "have you got the site?" McEwing told him "yes," that he had just spoken with Nicholas Westbrook and had asked him if we could use the site in Family's application, and that McEwing had expressed no objection, but requested a formal written proposal, in writing, to present to his board of directors. Savoie's notes of the conversation show that he noted Mr. Westbrook's name and telephone number as the person who gave Family permission to use the site ("site certification"). Ex. 3, p. 2. Savoie also asked McEwing who to call if he needed further technical information, and McEwing gave him Dave Gallety's number at WANC-FM. Ex. 1, p. 3.

12. In preparing the application Savoie became concerned about several technical issues, such as the electromagnetic radiation at the site and the spot, exactly, where Family's antenna could be located on the WANC tower. Ex. 3, p. 3. The next day (September 19, 1991) Savoie called the other occupant on the tower which Family was specifying, FM station WANC, licensed to Ticonderoga, New York, and spoke with a person on the WANC engineering staff, whose name Savoie couldn't now recall. Savoie's notes include a reference to "Dave Gallety of WAMC," but Savoie doesn't remember if that is the person with whom he spoke or the name of the person with whom he was instructed to speak. Savoie's telephone records show that the call consumed 15 minutes. Ex. 3, p. 3; Ex. 3, Att. C. Savoie told the person at WANC that he (Savoie) was preparing an application on behalf of Family Broadcasting, Inc. for an FM frequency in Hague, New York, that Family was specifying the WANC tower as its site, and that he needed some technical information to prepare the FCC application. Ex. 3, p. 3. Savoie's notes of his conversation with what he referred to as the WANC engineer show that they discussed the spot WANC occupied on the tower and technical details such as their height above ground and mean sea level, how the site was fenced, and the site's latitude and longitude. Ex. 3, p. 3.

13. As a consulting engineer Savoie has had many conversations with site owners and station engineers concerning antenna sites, and he has negotiated and arranged leases on many

towers for his clients. The person with whom Savoie spoke told him that he knew that McEwing had already called about the site, and that he had been instructed to be as accommodating as possible. He was, and following that conversation Savoie had no doubt that Family had permission to use the site.

14. Savoie prepared the engineering portions of an application specifying the Mt. Defiance site, and McEwing signed Family's application certifying its accuracy before the application was filed on September 24, 1991. Ex. 1, p. 3.

15. McEwing did not, however, send Mr. Westbrook the letter that he promised he would, essentially because he was too busy with Family's other projects, including the filing of a petition for reconsideration which required his presence in Washington, the construction of WGLV in Hartford, Vermont, and WGLY's annual fund-raising drive. Ex. 1, Att. A, p. 2; Tr. 48-49.

16. McEwing did not devote any attention to Mr. Westbrook or the site until he received a letter from Mr. Westbrook dated November 14, 1991, which was subsequently submitted to the FCC. Ex. 7, p. 2. In that letter, which was unsworn, Mr. Westbrook noted that he had read Family's legal notice of the filing of the application in the Times, and denied that Family had the approval "to do so from the property owners, the Fort Ticonderoga Association." Westbrook's letter referred to his conversation with McEwing in September concerning "lease possibilities during this current FCC window ..." and stated that:

... we would consider written proposals only, detailing technical and financial implications. I noted that we

had an upcoming Board of Trustees meeting in early October. Your only subsequent communication was the legal notice referred to above.

Your representation to the FCC is made under false premises: namely, that you have "reasonable assurance" of lease of appropriate facilities "on the top of Mount Defiance." That assurance has not been offered or implied--and will not be. We do not do business in this manner. Ex. 7, p. 2.

Mr. Westbrook's November 14, 1994 letter shows that a copy went to the president of the Fort Ticonderoga Association and blind copies to the "Hague Town Clerk" and "Dave Gallety." Ex. 7, p. 2.

17. In another unsworn submission to the FCC, dated June 7, 1993, Westbrook noted that:

I asked that he (McEwing) submit a written proposal for review by our Board of Trustees at its upcoming quarterly meeting on 5 October 1991. There was no suggestion that my request for a written proposal implied "reasonable assurance" of future access.

Family Broadcasting has never made that written proposal. Ex. 8, p. 2.

Mr. Westbrook's submission was sent to Mr. McEwing and Family's communications counsel. Ex. 8, p. 1.

18. When McEwing received Westbrook's letter he described his reaction as shocked and disturbed, because Westbrook had not expressed any objections to Family specifying the Mt. Defiance site. Ex. 1, Att. A, p. 2. McEwing faxed Westbrook a letter, in which he wrote:

I specifically told you on the phone ... that the FCC is a long process, and that if you had no objections we would be filing an application ... with a proposed transmitter on Mt. Defiant (sic) obviously pending your formal approval ... But, it was my impression from you

that your organization might have some interest in leasing space for the right price and terms-by legal definition of "reasonable assurance"-that impression is all that is necessary to file an FCC application-it gets the long process rolling.

Our intention was to file the application based on our impression that there was a tower rental opportunity available, and then formally submit the letter you requested. ... Ex. 1, Att. A, p. 11.

19. McEwing attempted to called Westbrook up to sooth his feelings and, because he hoped to be a neighbor in the area, he didn't want an enemy. Ex. 1, Att. A, p. 2. Westbrook refused to take McEwing's call.

20. Immediately after receiving Mr. Westbrook's letter, McEwing called Peter Morton, another consulting engineer with whom he was acquainted, to ask his help in finding a new site and preparing the engineering portions of an amendment to the Hague application. Ex. 1, p. 3. McEwing called Morton because he knew that Morton had worked in Ft. Ticonderoga and was familiar with the area and with its possible tower sites. McEwing was still angry when he spoke to Morton, and he told Morton that Westbrook had originally indicated to McEwing that he (Westbrook) had no objections to specifying the site and that he "had pulled the rug out from under us." Morton told McEwing that he was puzzled that Westbrook had changed his mind, since Morton had asked him (Westbrook) if he (Mr. Morton) could use the Mt. Defiance site during the summer and had been told exactly the same thing, and Morton believed that Westbrook had agreed for him to use the site too. Ex. 1, p. 4. Morton's recollection of the telephone conversation essentially matches McEwing's, and Morton recalls

that McEwing told him that Westbrook had given Family permission to use the site and then changed his mind. Ex. 2, p. 4. Morton also recalled that McEwing stated that Westbrook had told him that "he (Westbrook) was sure that they could work something out."

21. Morton is a consulting engineer doing AM, FM and LPTV application and field engineering for a variety of clients in the northeast, and has 26 years of experience in the broadcast industry in various technical and administrative positions, including part ownership of WMNV(FM), Rupert, Vermont, which was sold to Family Broadcasting in 1992. Ex. 2, p. 1.

22. During the Summer of 1991, Morton worked as the manager of WIPS, an AM daytime station serving Ticonderoga, New York. The WIPS transmitter site is located on property owned by the Ft. Ticonderoga Association, and Morton became acquainted with Nicholas Westbrook, who managed the sites and properties that the Fort owns. Morton became interested in the possible purchase of WIPS. Tr. 65. At that time Morton was aware that the FCC was in the midst of a rulemaking procedure to allocate a class A FM channel to Hague, New York, a town adjacent to Ticonderoga, and Morton did an allocation study which showed that the Mt. Defiance site owned by the Fort Ticonderoga Association would be by far the best site to provide service to Hague. Morton was interested in operating an AM-FM combination. Tr. 65.

23. Morton approached Mr. Westbrook about the availability of the site for an additional transmitter and antenna for the

proposed FM station. Ex. 2, p. 2. Morton met with Westbrook in Westbrook's office for about 30 minutes and discussed various application matters, including the required electric draw, how to place another transmitter in the already crowded electronics room, and the necessity of choosing the antenna that would have a small profile in order to preserve the historic nature of the Mt. Defiance Fort. Ex. 2, p. 2; Tr. 70-71. Westbrook told Morton his proposed lease terms: a minimum of \$300 per month plus a percentage of the station's gross revenues. Ex. 2, p. 2; Tr. 68. Morton neither agreed or disagreed with Westbrook's proposal (Ex. 2, p. 2), but he believed that he had reasonable assurance to use the Mt. Defiance site after that meeting. Tr. 78, 80. Mr. Westbrook never mentioned his Board of Directors during this conversation. Tr. 79.

24. When the FCC subsequently set a date to accept applications Morton again contacted Mr. Westbrook, this time by phone. Morton asked Westbrook about the availability of the Mt. Defiance site. Westbrook asked Morton if it were possible to use the AM tower site, which is located next to the lake in Ticonderoga, but Morton rejected the AM site as technically inadequate. Westbrook then agreed that the Mt. Defiance site was probably the best place, and told Morton something like "we can probably do something," or "it can be worked out" (Ex. 2, p. 2; Tr. 77), or, "if you have to use the FM, that's what we'll have to do. ..." Tr. 73. Westbrook also asked Morton for a letter to take to his board of directors outlining possible programming for

the new station and the technical requirements (size and shape) of the transmitter and antenna. Ex. 2, p. 2-3. Mr. Westbrook never said anything to the effect that he had to clear the proposal with the board, only that Morton needed a letter outlining the proposal to the board. Tr. 79.

25. As a consultant and as a former station owner Morton has arranged leases and rentals of transmitter sites a number of times. Ex. 2, p. 3. Morton believed, following his telephone call with Mr. Westbrook, that he had Westbrook's permission, i.e., "reasonable assurance" to specify the Mt. Defiance site as a transmitter site. Ex. 2, p. 2; Tr. 75. In all his conversations with Mr. Westbrook (both regarding the Hague allocation and his management of WIPS) Morton testified that Westbrook had always represented himself as the sole and complete decision maker for matters concerning the Mt. Defiance site, and had no doubt that he was authorized to proceed in preparing an application. Upon gaining a construction permit Morton expected that there would be further negotiations with Mr. Westbrook over the money, and with the board who would be interested in antenna size and placement, and other matter relating to preserving the historic nature of the Fort.

26. Following his receipt of Westbrook's November 14 letter McEwing also called Mr. Savoie, basically to express his anger. Ex. 1, p. 3. McEwing told Savoie about Westbrook's letter and stated that Westbrook had changed his mind since McEwing spoke with him in September. McEwing asked Savoie if he knew anything

about Mr. Westbrook's response, and he told me that he didn't, that he had called WANC shortly after my call to him in September, and that the WANC person with whom he spoke was extremely cooperative.

27. Mr. McEwing testified that he categorically believed that when he hung up the telephone after speaking with Mr. Westbrook he thought that he had obtained his permission to specify the Mt. Defiance site in Family's Hague application, and that all McEwing needed to do was describe its technical proposal in writing for Westbrook to take to the Board. Ex. 1, p. 4. McEwing got distracted by other business and never sent the letter that Westbrook requested. McEwing also noted that Fort Ticonderoga is a small community, where people know each other. Ex. 1, Att. A, p. 3. McEwing and Westbrook have common acquaintances, including Gallety. McEwing characterized it as highly unlikely that someone would be able to specify a site without someone discovering about it and bring it to Westbrook's attention.

28. McEwing testified that Mr. Westbrook's Mt. Defiance site is by far and away the best site for the Hague allocation, but it is not, however, the only one. Ex. 1, p. 4. McEwing was investigating one other site that was available when he called Mr. Westbrook, and following his letter to Westbrook McEwing was able to obtain a new site within six weeks. McEwing communicated the fact that Family was pursuing another site in his reply letter to Mr. Westbrook on November 18, 1991.

29. Family presented testimony from three separate witnesses who testified concerning the reputation of Alex McEwing for truth and veracity in the Burlington area. Rev. Robert D. Short is Mr. McEwing's former pastor who knew Mr. McEwing as an active member of the congregation, a former member of the church board of directors, and a promoter for a number of concerts sponsored by the church. Ex. 4, p. 1. Pastor Short testified that Mr. McEwing is well known in the community because of his community work with his church and radio station WGLY. Ex. 4, pp. 1-2. Short testified that McEwing handled the church concerts with scrupulous honesty, and has a reputation for high character and being an honest man. Ex. 4, p. 2. The community is small enough that any hint of scandal would be quickly known, and Pastor Short testified that he never heard anything implicating McEwing's honesty or character, which he characterized as totally unsullied. Short also noted that McEwing was elected to the church Board of Directors as a very young man, which he noted was a recognition by his congregation of McEwing's outstanding character and community service. George A. Schiavone is the State Representative for Chittenden County, District 5-1, and is extensively involved in a number of civic, political, fraternal and service organizations in the Burlington area. Ex. 5, p. 1. Representative Schiavone describes himself as a "community friend" of Mr. McEwing from their joint work in various community projects. McEwing is well known in the community from his community work with radio station WGLY and his

work in promoting various concerts and other musical events. Ex. 5, pp. 1-2. Schiavone testified that McEwing is widely known in the community as a truth teller, and has a reputation in the community for honesty and as a "straight-arrow." Representative Schiavone testified that: "[i]f Alex says something, people believe it as true," and that he has never heard anything connected with Mr. McEwing smacking of dishonesty, or even exaggeration. Ex. 5, p. 2. Scott Gifford Slocum is Mr. McEwing's present pastor, and testified concerning Mr. McEwing's reputation in the Greater Burlington area. Ex. 6, p. 1. Pastor Slocum also testified that Mr. McEwing and he live in a small community, and "there is no place for hidden sins." Mr. McEwing, according to Pastor Slocum, is known in the community for his integrity, and has a reputation as a truth teller and a straight shooter. Pastor Slocum also noted that Mr. McEwing works as a music promoter and that Mr. McEwing received reimbursement for his expenses from the artists taking part in the concerts. Ex. 6, p. 2. In a business where road managers usually require promoters to support and justify every cent, Pastor Slocum reported at least six instances where the artists paid Mr. McEwing simply on his word--which he characterized as a real tribute to Mr. McEwing's honesty and integrity.

III. CONCLUSIONS OF LAW

30. The Hearing Designation Order and the Presiding Officer's rulings in this proceeding provide three separate legal issues which these conclusions need to address:

-did Family have reasonable assurance of the availability of its specified antenna site when it filed its application?

-if not, did Family misrepresent that it had reasonable assurance of its antenna site when it filed its application?

-Should Family's amendment specifying a new site be accepted?

These issues will be addressed seriatim below.

A. **The Weight of the Evidence Establishes That McEwing Had Permission To Specify the Mt. Defiance Site In Family's Application**

31. The legal standard for determining whether Family had reasonable assurance of the availability of its specified antenna site is straight-forward--did Family have permission from the site owner to specify the Mt. Defiance site in its application. "Reasonable assurance" does not require the applicant to reach an agreement with the site owner concerning lease payments or other technical issues, but the applicant must have, as an irreducible minimum, the site owner's permission to specify the site in its application. In fact, National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 63 Rad. Reg. 2d (P&F) 1534 (1987), is directly on point. In National Innovative Programming Network an LPTV applicant's engineer called a station manager and asked if the manager would have any objections to the applicant specifying the site in its application. The Commission held that by giving his permission to the filing of the application the site owner had given the applicant "reasonable assurance" to specify the site. See also, Kaldor Communications,

Inc., 96 F.C.C.2d 995, 55 Rad. Reg. 2d (P&F) 567 (Rev. Bd. 1984) (oral promise by landowner to sell or lease property to applicant is sufficient for "reasonable assurance"). The essential inquiry is whether Family received this permission.

32. The crux of the issue--whether this permission was granted to Family--must be determined from apparently conflicting versions of one 10 minute telephone conversation that took place almost three and one-half years ago. Mr. McEwing's version of the conversation, in its essential details, was that he explained his purposes, explained that he needed reasonable assurance of the site and described what reasonable assurance meant, asked Mr. Westbrook if he had any objections to Family specifying the site, and, when none were expressed in response to a specific question, believed that he had received reasonable assurance that the site would be available (fdgs. ¶¶ 7-9). As Mr. McEwing put it, reasonable assurance meant "one that the site was available and secondly that it was available to rent for me" (fdgs. ¶ 8). Westbrook's version, in brief, is that he requested a written proposal in writing which was never received, and that a request for a written proposal did not imply permission to specify the site (fdgs. ¶¶ 16, 17). Family submits that the great weight of the evidence and inferences to be taken from the evidence support Mr. McEwing's account of the conversation--that Family did receive "reasonable assurance" of the availability of the site.

33. The first factor supporting Mr. McEwing's credibility is that Mr. McEwing's submissions to the Commission, and his

testimony, were given under penalty of perjury. Neither of Mr. Westbrook's submissions to the Commission were given under penalty of perjury. Moreover, three different persons testified that Mr. McEwing had a reputation in his community for truth and veracity, including both his former and present pastors and a Vermont State Representative who is involved with Mr. McEwing in a number of community activities (fdgs. ¶ 29). All three agreed that McEwing is well known in the community, and that the community is small enough that a person's character and reputation are well known--"there are no hidden sins." Each described McEwing as a "straight-arrow," a "truth-teller," and, a "straight-shooter," and, "[i]f Alex says something, people believe it to be true." A small example of McEwing's propensity to tell the truth is contained in his testimony where he did not testify that the "okay" in his contemporaneous notes referred to Westbrook's reaction to his request concerning the availability of the Mt. Defiance site. McEwing testified that these contemporaneous notes, which would have been powerful testimony supporting his version of the conversation, actually described his reaction to Westbrook's request for a written proposal, which he admittedly did not send (fdgs. ¶ 7).

34. Regardless of his reputation, however, McEwing's testimony deserves to be believed because it was positive, unconfused, unimpeached, solid in its essential details, believable, and consistent with other record facts and inferences to be drawn from those facts.